

**APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW
YORK, THIRD DEPARTMENT**

Matter of Dimaggio v. Mayrch Excavation Found.

2020 NY Slip Op 07636 (App. Div. 2020) · No. 529226 · Decided December 17, 2020

SUMMARY

The New York Appellate Division, Third Department, held that a claimant's oral exception to a Workers' Compensation Law Judge's findings was sufficiently specific under 12 NYCRR 300.13 (b) (4) (v). The court reversed the Workers' Compensation Board's denial of review and remitted the matter for further proceedings.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Third Department
WRITING FOR THE COURT	Colangelo, J.; Garry, P.J.; Egan Jr., J.; Mulvey, J.
JURISDICTION	New York
DECIDED	December 17, 2020
DOCKET	529226
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Claimant appealed a Workers' Compensation Board decision denying review of a Workers' Compensation Law Judge's decision classifying him as having a permanent partial disability and finding a 96% loss of wage-earning capacity.
STANDARD OF REVIEW	Whether the Board abused its discretion in denying the application for review for failure to interpose a sufficiently specific objection or exception under 12 NYCRR 300.13 (b) (4) (v).
PRECEDENTIAL VALUE	Published New York Appellate Division opinion
PARTIES	Ottavio Dimaggio v. Mayrch Excavation Foundation, Workers' Compensation Board

TOPICS

workers compensation

administrative law

judicial review of agency action

appellate procedure

standard of review

PRACTICE AREAS

workers compensation

administrative law

appellate procedure

QUESTIONS PRESENTED

1. Whether the claimant's counsel sufficiently stated a specific objection or exception to the WCLJ's oral findings to satisfy 12 NYCRR 300.13 (b) (4) (v).
2. Whether the Workers' Compensation Board abused its discretion by denying the claimant's application for review.

HOLDINGS

1. No formulaic objection is required following a WCLJ's issuance of oral findings.
2. Viewed in context, the claimant's exception was sufficiently specific to satisfy 12 NYCRR 300.13 (b) (4) (v).
3. The Board abused its discretion in denying the claimant's application for review.

KEY QUOTATIONS

*“No formulaic objection is required following a WCLJ's issuance of oral findings” (*2)*

*“under these circumstances, we find that the basis of claimant's exception, viewed in context, was sufficiently specific” (*2)*

FACTUAL BACKGROUND

Ottavio Dimaggio, an Italian-speaking carpenter, had an established workers' compensation claim arising from a 2014 back injury. After a January 18, 2018 hearing concerning loss of wage-earning capacity, the WCLJ classified him as having a permanent partial disability and initially stated that he had a 95% loss of wage-earning capacity, later correcting the figure to 96%. Counsel immediately stated and repeated that she was noting an exception, while Dimaggio expressed disagreement and confusion about why he was not classified as 100% disabled.

PROCEDURAL HISTORY

Claimant sought review by the Workers' Compensation Board of the WCLJ's oral and written findings concerning his classification and loss of wage-earning capacity, arguing that he was totally disabled. The Board denied review under 12 NYCRR 300.13 (b) (4) (v), concluding that counsel's general exception was not sufficiently specific. The Appellate Division reversed and remitted the matter to the Board for further proceedings.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The matter was remitted to the Workers' Compensation Board for further proceedings not inconsistent with the Appellate Division's decision.

CASES CITED

- Matter of Bruscino v Verizon, 178 AD3d 1272, 1272-1273 (2019)
- Matter of Markolovic v MTA Bus Eastchester Depot, 174 AD3d 1271, 1272 (2019)
- Matter of Sweeney v Air Stream A.C. Co., 167 AD3d 1222, 1222-1223 (2018), lv denied 33 NY3d 903 (2019)

OPINION

PER CURIAM.

Matter of Dimaggio v Mayrch Excavation Found. (2020 NY Slip Op 07636) Matter of Dimaggio v Mayrch Excavation Found. 2020 NY Slip Op 07636 Decided on December 17, 2020 Appellate Division, Third Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided and Entered: December 17, 2020 529226 [*1]In the Matter of the Claim of Ottavio Dimaggio, Appellant, vMayrch Excavation Foundation et al., Respondents. Workers' Compensation Board, Respondent. Calendar Date: November 23, 2020 Before: Garry, P.J., Egan Jr., Mulvey and Colangelo, JJ. Joel M. Gluck, New York City, for appellant. Kennedys CMK LLP, New York City (Michael R. Schneider of counsel), for Mayrch Excavation Foundation and another, respondents.

Letitia James, Attorney General, New York City (Alison Kent-Friedman of counsel), for Workers' Compensation Board, respondent. Colangelo, J. Appeal from a decision of the Workers' Compensation Board, filed June 8, 2018, which ruled, among other things, that claimant failed to comply with 12 NYCRR 300.13 (b) (4) (v) and denied review of a decision by the Workers' Compensation Law Judge.

Claimant, an Italian-speaking carpenter, has an established workers' compensation claim for an injury to his back stemming from a 2014 accident. The record was developed on the issue of permanency and, at the conclusion of a January 18, 2018 hearing regarding claimant's loss of wage-earning capacity, a Workers' Compensation Law Judge (hereinafter WCLJ) classified claimant as having a permanent partial disability and found that he has a 96% loss of wage-earning capacity.

Those findings were memorialized in a written decision, of which claimant sought review by the Workers' Compensation Board with respect to the degree of loss of wage-earning capacity and/or classification, maintaining that he is totally disabled.

The Board, as relevant here, denied claimant's application for review, finding that his general exception following the WCLJ's oral findings did not constitute a "specific objection or exception" sufficient to satisfy the requirements of 12 NYCRR 300.13 (b) (4) (v) because the legal basis of the exception could not be discerned without "some reference" to those findings, even if that reference was "not specific in detail."

Claimant appeals. The Board may, in its discretion, deny an application for review "where the appellant did not interpose a specific objection or exception to a ruling or award by a [WCLJ]" (12 NYCRR 300.13 [b] [4] [v]).

Here, at the conclusion of the January 18, 2018 hearing, the WCLJ put his findings on the record and concluded that claimant has a permanent impairment of the lumbar spine, severity ranking G, but is capable of performing limited sedentary work, and that, based on that and certain non-medical vocational factors, claimant has an overall "95[%]" loss of wage-earning capacity.

Immediately thereafter, claimant's counsel requested that the WCLJ "[n]ote [her] exception." The WCLJ proceeded to explain to claimant the benefits that he would receive based upon the classification, and claimant, with the assistance of an interpreter, inquired why he had originally received "the 100[%]." Counsel explained to claimant that the WCLJ had "made a decision for 95[%]" and that she had "noted an exception," or, "in other words,... said on the record that [she] do[es] not agree with the [WCLJ's] decision."

Claimant then continued to express confusion and disagreement with why he was not "give[n] the 100% because [he] cannot work anymore." Thereafter, the WCLJ clarified on the record that he had previously misspoken and that claimant's loss of wage-earning capacity was in fact 96%, prompting claimant's counsel to state that she was "still noting an exception," which the WCLJ acknowledged.

No formulaic objection is required following a WCLJ's issuance of oral findings [*2](see 12 NYCRR 300.13 [b] [4] [v] [a]), and, under these circumstances, we find that the basis of claimant's exception, viewed in context, was sufficiently specific (see 12 NYCRR 300.13 [b] [4] [v]).

The Board therefore abused its discretion in denying claimant's application for review (compare *Matter of Bruscino v Verizon*, 178 AD3d 1272, 1272-1273 [2019]; *Matter of Markolovic v MTA Bus Eastchester Depot*, 174 AD3d 1271, 1272 [2019]; *Matter of Sweeney v Air Stream A.C. Co.*, 167 AD3d 1222, 1222-1223 [2018], lv denied 33 NY3d 903 [2019]), and we accordingly remit the matter to the Board for further proceedings.

Garry, P.J., Egan Jr. and Mulvey, JJ., concur. ORDERED that the decision is reversed, without costs, and matter remitted to the Workers' Compensation Board for further proceedings not inconsistent with this Court's decision.

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